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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE SPOKANE TRIBE OF INDIANS, SHAKOPEE MDEWAKANTON DAKOTA COMMUNITY, COQUILLE INDIAN TRIBE, SHOALWATER BAY INDIAN TRIBE, WINNEBAGO TRIBE OF NEBRASKA, YAKAMA INDIAN NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I.

Does the legislative history of the Indian Gaming Regulatory Act show the clear intention of Congress to permit tribes to engage in class III gaming for various purposes?

II.

If the Court should decide that the Eleventh Amendment bars tribal suits against states for failure to negotiate in good faith, can the Court fashion an appropriate remedy without striking down Indian Gaming Regulatory Act in its entirety?

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INTERESTS OF AMICI CURIAE

Amici are federally recognized Indian tribes that have a compelling and obvious interest in the regulation of gaming on Indian lands. The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) could prevent amici and all other tribes

from exercising their sovereign gaming rights codified by Congress in the Indian Gaming Regulatory Act. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168) ("IGRA"). Amici support the Seminole Tribe in challenging the *Seminole* decision.

Amici are the Shakopee Mdewakanton Dakota Community, the Spokane Tribe of Indians, the Winnebago Tribe of Nebraska, the Yakama Indian Tribe, the Shoalwater Bay Tribe, the Coquille Tribe of Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Confederated Tribes of the Colville Reservation. All are federally recognized Indian tribes. The amici tribes represent the totality of circumstances that currently exists in Indian country, including tribes with successful class III operations pursuant to tribal-state compacts (the Shakopee Mdewakanton Dakota Community and the Winnebago Tribe of Nebraska), tribes in the initial stages of class III operations (the Coquille Tribe of Indians), tribes with challenged class III operations protected by interim injunctive relief (the Spokane Tribe of Indians) and district court decisions (Confederated Tribes of the Colville Reservation), tribes seeking their remedies under IGRA (Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Yakama Indian Tribe), and tribes that have had to abandon negotiations and class III gaming plans until the legal issue of IGRA's remedy is resolved (the Shoalwater Bay Tribe).

In passing IGRA, Congress fashioned a scheme for regulating class III gaming under which amici and all other federally recognized tribes must refrain from exercising their legal right to operate such gaming on tribal lands unless they enter into negotiated tribal-state compacts or pursue the remedial provisions of IGRA. To insure that inaction by states could not be used to impede tribal gaming rights, Congress provided tribes with a cause of action in federal courts to sue a state that refused to negotiate in good faith. Amici's interest in this case is that the Court requires states to carry out the Congressionally-mandated compromise that gives states the opportunity to have a significant role in the regulation of Indian class III gaming or that the Court fashion an alternative remedy to allow tribes to proceed without state participation.[1]

SUMMARY OF ARGUMENT

As the brief of Petitioner, the Seminole Tribe of Florida, and other amici will show, the Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. The purpose of this brief is to show by reference to legislative history that Congress, in a political process in which the states participated, adopted the class III tribal-state compacting process approach as a compromise between the competing sovereign interests of tribes and states. The class III compacting process, while perhaps not fully embraced by either side, is binding on each side. Earlier versions of IGRA and reactions to the Court's *Cabazon* decision[2] show that the debate on Indian gaming focused almost entirely on conflicting regulatory interests of tribes and states. The tribal-state compacting provisions, absent from earlier unsuccessful bills, were included in IGRA in an effort to resolve competing sovereign interests. There is scant evidence in the legislative history of state opposition to the compacting provisions and there is absolutely no evidence of any state opposition based on Eleventh Amendment grounds.

The legislative history also shows that Congress, as part of the compromise, allowed the states a voice they

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

[2] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

would not otherwise have had in the regulation of Indian gaming by incorporating the public policy test set forth in the *Cabazon* decision. Congress understood and expected that states would adhere to the compacting process and work with tribes to complete compacts in accordance with the provisions of IGRA. Initially, this is precisely what happened. However, several states, which had offered no opposition to the compacting provisions during the legislative process, now challenge them on Eleventh Amendment grounds.

The purpose and intent of IGRA is to allow tribes the opportunity to engage in gaming, consistent with *Cabazon*, for the purpose of economic development and tribal self-sufficiency. 25 U.S.C. § 2710. That goal is paramount and overrides any state claim to immunity. Even if the Court accepts the states' position on the Eleventh Amendment immunity, it must still consider the intent of Congress to provide a remedy in the event a state fails to abide by the compacting provisions.

Should the Court determine that the states prevail on the Eleventh Amendment issue, the Court must fashion a remedy for the tribes, either by striking down IGRA in its entirety or by severing those portions of IGRA that preclude tribes from proceeding with class III games without a compact. The amici tribes submit that the enforcement and remedial provisions are fundamental to the scheme established by Congress such that mere severance of the enforcement and remedial provisions would result in a scheme wholly inconsistent with the intent of Congress. The amici tribes submit that if the Court determines that Congress lacks the constitutional authority to abrogate states' immunity from suit, it should grant certiorari of the State of Florida's cross-petition in this matter, (Docket Number 94-219) and the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of Alabama*, (Docket Number 94-35), and determine the remedy for tribes in the absence of an agreed upon tribal-state compact.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF IGRA SHOWS THAT CONGRESS ADOPTED THE CLASS III TRIBAL-STATE COMPACTING PROVISIONS TO RESOLVE COMPETING SOVEREIGN INTERESTS.

A. The Legislative History of IGRA and Reactions to the *Cabazon* Decision Indicate That the Debate Over Indian Gaming Focused on Tribal and State Regulation of Indian Gaming on Indian Lands.

The Indian Gaming Regulatory Act passed in the 100th Congress and was signed into law as P.L. 100-497 by President Reagan on October 17, 1988. Enactment of this Act was the culmination of several years of Congressional hearings and debates that began in the 98th Congress:

> [IGRA] is the outgrowth of several years of discussions and negotiations between gaming tribes, states, the gaming industry, the Administration and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands.

S. Rep. No. 446, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3071.

In the 98th Congress (1984-85), bills were introduced in both the House and Senate. While Committees in both bodies held hearings, no other official action occurred. S. Rep. No. 446, 100th Cong., 2d Sess. 3 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3073.

In the 99th Congress (1985-86), the level of Congressional activity increased dramatically. The House Committee on Interior and Insular Affairs held three hearings in 1985 on two Indian gaming bills, H.R. 1920 and H.R. 2404 (three additional bills on Indian gaming were introduced in the House in the 99th Congress). *Id.*

Charman Morris K. Udall of the House Interior and Insular Affairs Committee sponsored H.R. 1920, the bill that emerged as the primary legislative vehicle for Indian gaming in the 99th Congress. *Id.* As reported to the House floor in April 1986, H.R. 1920 would have placed regulation of class III gaming jointly with tribal governments and the proposed new National Indian Gaming Commission. *Id.* Tribes were vocal and adamant in their opposition to any intrusion of state jurisdiction and supported the bill as reported.

On April 29, 1986, just eight days after passage of the House bill, the Court docketed the *Cabazon* case. The Court's decision to review the *Cabazon* case, which had been a solid victory for the tribes at the Appeals Court level, caused concern among tribal government leaders who may have viewed the granting of certiorari to the State of California as a negative signal from the Court. Had the Court denied certiorari and let the Appeals Court decision stand, tribal leaders may have had more confidence in their position against intrusion of state regulatory jurisdiction in Congress. Ultimately, of course, the Court upheld the Ninth Circuit Court of Appeals' decision in the *Cabazon* case, but not until February 1987. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). During that interim period a considerable amount of legislative activity continued in Congress with debate focused on the scope of state jurisdiction of Indian gaming activities.

B. S. 555 Was Amended To Include the Tribal-State Compact Provision To Accommodate Competing Tribal and State Interests and To Provide an Enforcement Mechanism To Insure Tribes' Ability To Engage in Class III Gaming.

As introduced on February 19, 1987, Senate Bill 555, which eventually became IGRA,[3] would have made class

[3] Other Indian gaming bills introduced in the 100th Congress included S. 1303, introduced on June 2, 1988, by Senators McCain, Inouye, and Evans; S. 1841, introduced on November 4, 1987 by Senators Hecht and Reid; H.R. 1079, introduced on February 4, 1987 by Representatives Udall and Bereuter; H.R. 964, introduced on February 4, 1987 by Representatives Coelho, Lujan and Pepper; H.R. 2507, introduced on May 21, 1987 by Representatives Udall, Young, Campbell, Smith and Bereuter; and H.R. 3605, introduced on November 3, 1987 by Representatives Vucanovich and Bilbray. S. 1303 and H.R. 2507 were identical bills when introduced and H.R. 2507 became the House legislative vehicle for Indian gaming. S. Rep. No. 446, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3074.

III gaming unlawful on Indian lands under section 1166 of title 18 of the United States Code, *unless* such gaming activity was located in a state where the gaming was "otherwise legal" and the Secretary of the Interior consented to the transfer of all civil and criminal jurisdiction "pertaining to the licensing and regulation of gaming . . . to the State within which such gaming enterprise" was to be located. S. 555, 100th Cong., 1st Sess. § 11 (1987). The glaring problem with that scheme was the lack of an enforcement mechanism to insure that states would in fact assume jurisdiction over and allow gaming on Indian lands.[4]

[4] Recognition of this problem by Congress is evidenced by Rep. Vucanovich's statements on S. 555, as amended to include the current tribal-state compact provisions:

> Many State law enforcement officials had advocated complete State jurisdiction over gaming on Indian lands. Some tribes, on the other hand, advocated strictly tribal jurisdiction over all forms of gaming by requiring the States and the tribes to negotiate with one another, this bill favors neither State jurisdiction nor exclusive tribal control.
>
> In order to meet tribal concerns that States may refuse to allow them to initiate class III gaming, the bill includes protections for tribes in the process or [sic] achieving a compact. In particular, the bill requires States to negotiate in good faith with the tribes and establishes standards for determining whether this requirement has been met. The bill grants tribes a federal cause of action against States for failure to negotiate in good faith. If a court finds that the State did not negotiate in good faith, the bill prescribes further procedures, including a court-ordered second round of

On February 25, 1987, just six days after the introduction of S.555, the Court issued its decision in the *Cabazon* case. The decision helped to buttress the tribes' position objecting to the imposition of any state regulation on Indian lands.[5] On May 13, 1988, the class III jurisdictional arrangement was adopted by the Committee when it acted on the bill at a business meeting and ordered an amendment in the nature of a substitute to be reported to the full Senate. The substitute amendment contained the tribal-state compact provisions of IGRA. Chairman Daniel K. Inouye's statement at the business meeting is instructive in tracing the development of the tribal-state compacting provision for class III provided in IGRA. He said:

> "[C]ertain principles have been part of established law for over 150 years since the Supreme Court first articulated the principle that Indian tribal governments are sovereign, domestic dependent sovereigns that have all the attributes of any sovereign entity subject to the powers and rights of the federal government. Our Constitution establishes a relationship for tribal governments that is exclusive to the federal government. Unless authorized by federal law, the jurisdiction of state governments does not apply on Indian lands. We have come a long

negotiations, submittal of the matter to a mediator, and the establishment of class III gaming procedures by the Secretary of the Interior.

134 Cong. Rec. H8154 (1988).

[5] Many tribes opposed the imposition of any state involvement as an unjust intrusion on tribal sovereignty and maintained this position during the development of S. 555 in the 100th Congress. Just after passage of IGRA, the Red Lake Band of Chippewa Indians and other tribes filed an unsuccessful suit in the Federal District Court for the District of Columbia challenging the constitutionality of the Act. *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9 (D.D.C. 1990), *aff'd sub nom, Red Lake Band of Chippewa Indians v. Brown*, 928 F.2d 467 (D.C. Cir. 1991).

> way since the period of termination policy of the 1950's, and I believe that it is important that the legislation we consider here today recognize the fundamental principles of Indian law, one of which is the tribal governments will not be subject to state jurisdiction absent their consent.
>
> * * * *
>
> What I propose to the Committee today is a mechanism that will provide for the comprehensive regulation of gaming activities on Indian lands employing existing state licensing and regulatory schemes, *only* if tribal governments in exercising their sovereign prerogatives, choose to submit themselves to state jurisdiction. . . . I believe that the best means of assuring tribal government consent to the jurisdiction of state laws is a mechanism that has been used many times over the course of our history between equal sovereigns—the right to enter into compacts that is recognized in the Constitution. These compacts would be negotiated at arms length between two sovereign entities—state and tribal governments. . . . Failure to reach a compact within a given time period will constitute sufficient cause for a cause of action in federal district court, in which the state will have the burden of proof to demonstrate why a compact was not concluded with the applicant tribal government. Should a court find against a state, the Secretary of the Interior will be empowered to impose a compact under which the two sovereign entities will operate. . . . I believe this approach will accomplish several objectives. One, it will assure that state governments are encouraged to enter into good faith negotiations with tribal governments. Two, it will assure that state laws are not applied on Indian lands without tribal government consent and action to request the application of state laws. Third, it will assure a comprehensive scheme of licensure and regulation of Indian gaming activities consistent with the state law.

Unpublished Statement of Chairman Inouye, May 13, 1988, National Archives, RG 46 Records of the U.S. Senate, Indian Affairs, 100th Cong., Legislative Bill Files (1987) S.555, Box No. 100-22.

The Committee report reflects the importance of the tribal-state compacting process as a compromise and an enforcement mechanism:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation. . . . The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a mechanism for setting [sic] various matters between two equal sovereigns.

S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin News 3071, 3083.

C. IGRA Passed on a Voice Vote in the Senate and by an Overwhelmingly Favorable Vote in the House, Indicating the Strong Support of Congress for the Compromise Compacting Provision for Class III Gaming.

The Senate debated and passed S. 555 by voice vote on September 15, 1988. During the debate, only two Senators voiced opposition to the bill: Senator Burdick because of concerns of the State of North Dakota about the scope of games that would be subject to the compacting process, 134 Cong. Rec. S12655-56 (1988), and Senator Daschle of South Dakota opposed the bill because tribes in South Dakota did not support the class III tribal-state compacting provisions. *Id.*, at S12657. No Senator opposed the compacting procedures or spoke on behalf of any state so opposed.

The House debated the bill, S. 555, on September 26, 1988, and the bill passed on September 27, 1988, by a vote of 323 to 84. *Id.*, at H8153-57, 8426-27. During the House floor debate on September 26, 1988, only three members spoke in opposition to the bill: Representatives Frenzel and Sikorski from Minnesota opposed the bill because of the potential imposition of state jurisdiction on Indian lands through the tribal-state compacting process, *Id.*, at H8155-57; Representative Henry of Michigan opposed the bill because he objected to the "grandfather" clause for certain class II card games played by tribes in the State of Michigan. *Id.*, at H8155. Not a single member of the House of Representatives spoke in opposition to the bill on behalf of any state with respect to the compacting provision.

S. 555 passed with unanimous consent without a recorded vote in the Senate. The vote was nearly four to one in the House. Clearly there was strong Congressional support for the compacting provision. State opposition to the compact provisions in the legislative record is limited to the concerns expressed by Senator Burdick on the matter of scope of games.

II. CONGRESS INCORPORATED THE PUBLIC POLICY TEST SET FORTH IN THE *CABAZON* DECISION IN IGRA IN RESOLVING COMPETING SOVEREIGN INTERESTS.

In enacting IGRA, Congress made the express finding that:

> Indian Tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of

> criminal law and *public policy*, prohibit such gaming activity.

25 U.S.C. § 2701(5) (emphasis added).

By adopting the Court's balancing of tribal, federal and state interests analysis and *Cabazon's* public policy test into IGRA, Congress decided to allow the states a voice they would not otherwise have had in regulating Indian gaming. Every federal court, except one,[6] which has addressed the question has held that the public policy test set forth in *Cabazon* determines the scope of class III gaming under IGRA. *See Machantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) ("We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibitory—civil/regulatory test to Class III gaming"); *Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268, 1282 (D. Idaho 1994) ("*Cabazon* and IGRA clearly restrict gaming on Indian lands to those types of [class III] games permitted by the state and/or those games which do not violate the law and public policy of the state"); *Ysleta Del Sur Pueblo v. Texas*, 852 F.Supp. 587, 592 (W.D. Texas 1993) ("The civil/regulatory and criminal/prohibitory analysis was intended to be part of the IGRA framework determining the appropriate scope of Class III gaming.") *rev'd on other grounds*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 63 USLW 3685 (1995), *cert. denied*, 63 USLW 3689 (1995); *Lac du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. Wisconsin*, 770 F. Supp. 480, 486 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (1992), *cert. denied*, 113 U.S. 91 (1992) ("the initial question in determining whether Wisconsin permits the gaming activities [under IGRA] is whether Wisconsin public policy towards Class III gaming is regulatory or prohibitory").

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[6] *See Rumsey Indian Rancheria of Winton Indians v. Watson*, 1994 WL 635178 (9th Cir. 1994), *motion for rehearing and rehearing en banc pending.*

These courts applied the *Cabazon* test as intended by Congress:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

S. Rep. No. 100-446, 100th Cong., 2d Sess. 6 (1988).

IGRA permits states to be involved in a process that had previously excluded them. IGRA is the political embodiment of Congress' reaction to the Supreme Court's ruling in *Cabazon*, and embodies the fundamental holdings of the *Cabazon* Court. IGRA does accommodate states by allowing them to participate in the process to establish a regulatory framework for class III gaming by requiring that regulation of class III gaming activities be pursuant to the terms of tribal-state compacts negotiated between two sovereign governments. The states that sit down at the negotiation table with tribes, ostensibly pursuant to IGRA, are the same states who, when confronted with IGRA's remedial provisions, assert IGRA is unenforceable against them. In other words, states take the position that not only does IGRA allow states to be involved in the process of establishing a regulatory framework for class III gaming, it also allows states unequivocally to preclude class III gaming on Indian lands simply by refusing to consent to suit pursuant to IGRA. The Ninth Circuit noted the irony and inconsistency of the states' position in *Spokane Tribe of Indians v. Washington State, et al.*, 28 F.3d 991 (9th Cir. 1994) (cert. pending DK #94-357), 63 USLW 3161 (1994):

> In grappling with the sensitive issues following the state of California's defeat in *Cabazon Band*, Con-

gress tried to fashion a plan that would enable states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. *Indeed, principles of state sovereignty are singularly out of place in such a scheme,* where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

Id. at 997 (emphasis added).

III. AFTER IGRA WAS ENACTED, MANY STATES ADHERED TO THE COMPROMISE STRUCK IN IGRA AND WORKED WITH TRIBES TO COMPLETE COMPACTS WITHOUT RAISING ELEVENTH AMENDMENT CHALLENGES.

Immediately after IGRA was enacted, many states accepted and proceeded with the compact process as Congress envisioned. One of the earliest and best examples of how IGRA's remedial and enforcement provisions can work is found in the experience between the Mashantucket Pequot Tribe and the State of Connecticut. Governor Weicker's administration refused to negotiate with the Pequot Tribe. After 180 days had passed since the Tribe's formal requests to enter into good faith negotiations under IGRA, the Tribe filed suit in federal court pursuant to 25 U.S.C. § 2710(d)(7)(B)(i). *Mashantucket Pequot*, 913 F.2d at 1027. After the court found Connecticut had failed to conclude negotiations in good faith, the court ordered the sixty day negotiation/mediation process set forth in 25 U.S.C. § 2710(d)(7)(B)(iv). Connecticut refused to consent to the compact selected by the Mediator, which resulted in the Secretary prescribing, in consultation with the Pequot Tribe, procedures consistent with the proposed compact selected by the Mediator. 56 Fed. Reg. 24996-98 (1991). Since then, the State and the Tribe have come to full agreement on gaming issues and are no longer in an adversarial relationship. As a result, the Mashantucket Pequot Tribe has achieved the tribal economic development, tribal self-sufficiency, and strong tribal government that Congress intended in enacting IGRA. 25 U.S.C. §§ 2701(4), 2702(1). The Mashantucket Pequot experience stands as a visible example of how Congress intended the remedial and enforcement provisions of IGRA to work.

However, after the initial successes of IGRA's compacting process in Connecticut, Minnesota and elsewhere, several states now raise Eleventh Amendment defenses to good faith lawsuits brought by tribes under IGRA when negotiations break down.[7] In essence, these states are doing just what Congress and the tribes most feared: that is, they are preventing the compacting process for class III gaming by tribal governments from going forward.

IV. IF THE ELEVENTH AMENDMENT BARS THE TRIBES' CLAIMS AGAINST STATES AND STATE OFFICIALS, IGRA MUST OTHERWISE PROVIDE A REMEDY FOR TRIBES.

The crux of the tribes' argument is that Congress did not intend, and federal courts cannot interpret, IGRA to allow states totally to preclude tribes of their class III gaming rights simply by refusing to negotiate in good faith, and then refusing to consent to the jurisdiction of the federal courts. The amici tribes have consistently maintained that the better-reasoned ruling is that the states' Eleventh Amendment defense fails. However, if Congress lacks the constitutional authority to abrogate Eleventh

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[7] More recently, states have raised yet another defense that IGRA violates the Tenth Amendment. *See Rumsey Indian Rancheria of Winton Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), *motion for rehearing and rehearnig en banc pending. Confederated Tribes of the Colville Reservation v. State of Washington.* 20 ILR 8124 (1993).

Amendment immunity, the courts must otherwise interpret IGRA in a manner that provides a remedy for tribes. This section addresses the implications of Congress lacking authority to abrogate the states' Eleventh Amendment immunity, and the application of severance analysis to determine the tribes' remedy in the absence of federal court jurisdiction over states hostile to IGRA and hostile to the tribes with Indian lands in those states.

A. If an Adequate Remedy Is Not Otherwise Available to Tribes, IGRA in Its Entirety Should Be Struck Down as Unconstitutional.

If Congress lacks the authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity, and no remedy for a state's refusal to negotiate in good faith is otherwise available to tribes, the entire IGRA must fall and the applicable law governing Indian gaming will be the *Cabazon* decision, wherein states will have no role, whatsoever, in the regulation of class III gaming on tribal lands. The compacting process is the crux of the entire IGRA; if the Tribe has no recourse against a State that fails to negotiate in good faith, the foundation of IGRA will have collapsed.

An entire legislative act of Congress should be ruled unconstitutional if: (1) it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not within its power; (2) the legislation cannot function independently of the flawed provision; (3) the legislation, absent the flawed provision, will not operate in a manner consistent with the intent of Congress; or (4) the statute created in the absence of the flawed provision is one which Congress would not have enacted. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-86 (1987); *see also, Sloan v. Lemon*, 413 U.S. 825, 834 (1973). *Carter v. Carter Coal Co.* 298 U.S. 238, 314-16 (1936). All four tests are mere variations of the courts' responsibility to reflect Congressional intent. *The lodestar of Supreme Court case law*

on the issue of severability is legislative intent. Regan v. Time Inc., 468 U.S. 641, 653 (1985).

Without recourse against states, the remaining shell of a statute would be nonsensical. Government-to-government negotiations would be transformed into tribal subservience to arbitrary state control. IGRA's express purpose of "promoting tribal economic development, self sufficiency, and strong tribal government," 25 U.S.C. §§ 2701(4), 2702(1), would be a mockery. Congress would not have enacted any other portion of IGRA without recourse available to tribes with Indian lands in states hostile to IGRA.

If the elimination of an enforcement provision essentially eviscerates a statute and creates a program quite different from the one Congress actually adopted, the entire statute must be found to be unconstitutional, regardless of the presence of a severability clause. *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). If Congress intended to have various components of a statutory scheme either operate together or not at all, failure of one component causes the entire Act to fall. *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), *stay denied* 857 P.2d 1285, *cert. gr. judg. vacated* 109 S. Ct. 859 *on remand* 871 F.2d 104 (1989) (striking down federal sentencing commission). If a law without the flawed provision would cause an unintended result, the entire law must fall. *Matter of Reyes*, 910 F.2d 611 (9th Cir. 1990) (striking executive order entitling aliens in the armed services to become citizens). The critical question remains; does the removal of a flawed provision (allegedly IGRA's enforcement and remedial provision) cause the remaining provisions of IGRA to work in a manner that constitutes a significant departure from initial Congressional intent?

The tribes' ability to file suit against uncooperative states, which is embodied in IGRA's abrogation of

state sovereign immunity, is so fundamental and essential to the workings of IGRA that the entire statute should be struck down if this Court adopts the states' position on the Eleventh Amendment immunity, unless this Court, through severability analysis is otherwise able to provide a remedy to the tribes. The facts surrounding the adoption of IGRA fit each and every one of the variations of the severability test set forth above. In contrast, the states argue that only the enforcement of remedial provisions of IGRA should be struck. The remaining text of IGRA would then allow the states to preclude a tribe from class III gaming by simply refusing to consent to suit.

One effect of merely severing the enforcement or remedial provision is the deprivation of the tribes' ability to engage in class III gaming if states simply ignore the tribes' request. Congress intended to avoid this effect:

> It is the Committee's intent that the compact requirement for class III not be used as justification by a state for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

S. Rep. No. 446, 100th Congress, 2d Sess. 13, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3082. IGRA was intended to provide a means by which tribes may conduct class III gaming; severance of the enforcement or remedial provision produces just the opposite result, one in which there is no class III gaming whatsoever.

A second effect of merely severing the enforcement or remedial provision is the arbitrary and outright transfer of state jurisdiction in those states that are willing to permit class III gaming. The tribes will have no leverage in the negotiation process; they would either have to succumb to states' demands, or forgo any class III gaming

opportunities. Congress had considered and rejected a statutory scheme that granted regulatory authority to states. Senator Inouye, then Chairman of the Senate Select Committee for Indian Affairs, expressed the reason for rejecting such a scheme:

> [T]he committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming.

134 Cong. Rec. S12650 (Sen. Inouye). Former U.S. Representative Morris Udall, then the Chairman of the House Interior and Insular Affairs Committee, made a similar statement:

> Over the years, I have strongly resisted the imposition of State jurisdiction over Indian tribes in this and other areas . . . S 555 is the culmination of nearly six years of congressional consideration of this issue. The basic problem which has prevented earlier action by Congress has been the conflict between the right of tribal self-government and the desire for State jurisdiction.

134 Cong. Rec. H8153 (Rep. Udall). The effect of IGRA without the enforcement or remedial provision is to eliminate the very tribal sovereignty that IGRA was intended to protect.

The inevitable consequences of an IGRA without abrogation of state immunity demonstrate the massive importance the enforcement or remedial provision played in establishing the Congressional scheme for the regulation of class III gaming. The compact process is the key to the delicate balance desired by Congress:

> [T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. The

> Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

S. Rep. No. 446, 100th Congress, 2d Sess. 5, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3076. The negotiations were intended to be among sovereign equals:

> This bill establishes a framework in which Indian tribes and States can meet as equals, government-to-government, to negotiate an agreement—a compact—for a mutually acceptable method of regulating high-stakes gambling on Indian reservations.

134 Cong. Rec. H8155 (Rep. Coelho). This equality was to be achieved by the recourse available to tribes to sue uncooperative states in federal court:

> [25 U.S.C. § 2710(d)(7)] grants the tribe a right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming interests against the interests of States in regulating such gaming . . . the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated. . . .

S. Rep. No. 446, 100th Congress, 2d Sess. 14, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3084. Without the enforcement or remedial provision, the delicate balance intended by Congress is impossible to achieve.

B. If IGRA's Remedial Provisions Breach the Eleventh Amendment, the Court Should Grant the States' Cross-Petition for Certiorari and Determine an Adequate Remedy for Tribes.

When faced with fashioning a remedy with a constitutionally defective statute, the Supreme Court has encouraged restructuring the statute to adopt simple and equitable results. *Califano v. Westcott,* 443 U.S. 76, 93 (1979). The federal courts may draw from their broad powers in equity in fashioning the remedy. *Id.* Often in the context of statutes extending benefits to a particular class, the federal courts have upheld extending the coverage of a statute to include those who are aggrieved by a constitutionally defective exclusion. *Heckler v. Mathews,* 465 U.S. 728, 738 (1984) (pension offset plan extended to apply to nondependent women as well as nondependent men). Specifically, the courts should measure the intensity of commitment to the residual policy and consider the potential disruption of the statutory scheme that would occur by extension as opposed to exclusion. *Id.; Welsch v. United States,* 398 U.S. 333, 365 (J. Harlan concurring). IGRA need not be struck down in its entirety if the courts otherwise provide a viable remedy. Many tribes, including several of the amici tribes submitting this brief, are successfully operating class III gaming pursuant to tribal-state compacts and prefer to continue operations pursuant to those compacts. Fashioning a remedy for tribes confronted with hostile state governments is the preferred and least disruptive result.

The most thorough discussion in IGRA cases addressing the ability of a tribe to go forward with class III gaming activities without a compact is Judge Fremming Nielsen's severance analysis in *Confederated Tribes of the Colville Reservation v. Washington,* 20 ILR 3124 (E.D. Wash. 1993). After determining that the Confederated Colville Tribes' lawsuit under IGRA against Washington State must be dismissed because Congress lacks

constitutional authority to subject unconsenting states to the jurisdiction of the federal courts (Eleventh Amendment) and to compel states to negotiate fairly with tribes (Tenth Amendment), Judge Nielsen ruled that IGRA must provide recourse to the tribes:

> *If this court were to only sever the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach an Agreement with the State.* Thus subsection (d) regarding class III gaming is not fully operable without the unconstitutional language. Further, even if subsection (d) were fully operable without the unconstitutional portions, the language of the Act and the legislative history indicate State participation and speedy resolution of any impasse were key components of the bill. . . *Therefore the entire subsection (d) regarding class III gaming must be severed from the act as unconstitutional.*

20 ILR at 3127 (emphasis added). Judge Nielsen lays out a two part test to determine what remains and what must be struck from IGRA: (1) if severed, are the remaining provisions fully operative; and (2) if fully operative, would Congress have enacted IGRA without the deleted provisions. *Id.* Judge Nielsen, in striking all of 25 U.S.C. § 2710(d) may have been overbroad, and instead should have been more meticulous in determining what portions of § 2710(d) should be struck, and what other portions should be saved.

For example, both 18 U.S.C. § 1166 and IGRA's exemption of 15 U.S.C. § 1175 (the Johnson Act), set forth that class III gaming is subject to criminal sanctions and civil forfeiture unless a compact is in place. IGRA's exemption of the Johnson Act is embodied in § 2710(d) and both are operable without the unconstitutional language requiring a tribal-state compact. Congress clearly intended for Tribes to be able to regulate machine gaming in states where machine gaming is "permitted" gaming.

Hence the portion of 18 U.S.C. § 1166 excluding class III gaming from its definition of gambling should be read without reference to a compact (material shown in italics to be struck):

> **(c) For the purpose of this section, the term 'gambling' does not include—**
>
> > **"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or**
> >
> > **"(2) class III gaming** *conducted under a Tribal State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.*

18 U.S.C. § 1166 (material shown in italics to be struck). Similarly, IGRA's explicit exemption of class III gaming from the Johnson Act should be read without reference to a compact.

> **The provisions of section 1175 of Title 15 shall not apply to any gaming conducted [in]** *under a Tribal State compact that—*
>
> > *(A) is entered into under paragraph (3) by* **a State in which gambling devices are legal,** *and*
> >
> > *(B) is in effect.*

25 U.S.C. § 2710(d)(6) (materials shown in italics to be struck). Under the logical extension of Judge Nielsen's analysis, class III gaming must still be played pursuant to tribal law and regulation, must still be played pursuant to an ordinance approved by the National Indian Gaming Commission, and must still be "permitted gaming for any purpose by any person, organization or entity," in the applicable state, must be conducted in

conformance with the provisions of IGRA and any other applicable federal law, but the requirement of a compact should be severed from their application.

The Eleventh Circuit addressed the remedial issue in its determination that tribes may proceed to the Department of interior for procedures in lieu of a compact. *Seminole Tribe,* 11 F.3d at 1029, which ruled in pertinent part:

> Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and *the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands.* This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

11 F.3d at 1029 (emphasis added). The amici tribes suggest that the extension of Judge Nielsen's analysis is the better-reasoned approach, but agree with the Eleventh Circuit that IGRA must be interpreted in a manner that provides a viable remedy for the tribes. The states' Petition for Certiorari asks that the cited portion of the Eleventh Circuit opinion be reviewed. If the court concludes that Congress lacks constitutional authority to abrogate Eleventh Amendment immunity, the amici tribes concur that certiorari should be granted in two cases: to the State of Florida's cross-petition in this matter (Docket Number 94-219) and to the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of*

Alabama (Docket Number 94-35). Both the Eleventh Circuit and the courts in *Colville Tribes* have ruled that IGRA must be interpreted in a manner that provides an adequate remedy to the tribes.

Those two approaches are among others that this Court should consider if the Court determines that Congress lacks the authority to abrogate Eleventh Amendment immunity. A remedy must be available to the tribe, whether it be a compact, a court-appointed mediator, departmental regulations, or exclusive tribal law and regulation. If no remedy exists, then no IGRA exists. The federal District Court in *Willis v. Fordice,* 850 F.Supp. 523 (S.D. Miss. 1994) also reinforces the amici tribes' position:

> Alternatively, even if IGRA is unconstitutional, the Court must adhere to the decisions of the United States Supreme Court. Therefore, under the holding from *Cabazon Band,* the Court finds that *even if Congress lacked the authority to set forth the procedures under IGRA and abrogate the Eleventh Amendment immunity of the states, gaming must still be allowed on Indian lands.*

850 F.Supp. at 530 (emphasis added). The result here is driven by Congressional intent. Congress clearly intended that tribes be able to exercise their sovereign right to offer all forms of gaming that are consistent with the public policy set forth in the landmark case, *Cabazon.* The amici tribes implore this court to further give meaning to the legislative intent underlying passage of IGRA regardless of the constitutionality of IGRA's abrogation of Eleventh Amendment immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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